

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

**REPLY COMMENTS OF**  
**THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

Walter G. Blackwell, President  
David Gusky, Executive Vice President  
The Association of Communications  
Enterprises  
1401 K Street, N.W., Suite 600  
Washington, D.C. 20005  
Telephone: (202) 835-9898  
Facsimile: (202) 835-9893

Dated: July 17, 2002

**TABLE OF CONTENTS**

I.	INTRODUCTION AND SUMMARY .....	1
II.	THE SUPREME COURT MANDATES UNE-P IN <i>VERIZON COMMUNICATIONS, INC. V. FCC</i> . ....	2
III.	THE D.C. CIRCUIT’S DECISION IN UNITED STATES TELECOM ASS’N V. FCC IS ERRONEOUS IN MANY RESPECTS. ....	3
A.	USTA IS INCONSISTENT WITH THE SUPREME COURT’S VERIZON DECISION ON TELRIC. ....	4
B.	USTA IS CONTRARY TO THE PRINCIPLES OF CHEVRON. ....	4
C.	UNE-BASED COMPETITION IS NOT SYNTHETIC. ....	5
D.	IN LIGHT OF THESE ERRORS, THE COMMISSION SHOULD DEFER ITS DECISION IN THIS DOCKET. ....	6
IV.	THE FCC SHOULD RETAIN ITS EXISTING UNBUNDLING ANALYSIS AND UNES TO PRESERVE AVAILABILITY OF UNE-P. ....	6
A.	CLECs WOULD BE IMPAIRED WITHOUT ACCESS TO THE EXISTING UNES COMPRISING UNE-P. ....	6
1.	The Commission Must Require Continued Unbundled Access to Local Loops. ....	7
2.	The Commission Must Require Continued Unbundled Access to Local Switching Services. ....	7
3.	Unbundled Shared Interoffice Transport Should Continue to Be Made Available. ....	8
4.	Operator Service and Directory Assistance (OS/DA) Must Remain Unbundled. ....	9
B.	UNE-P PROMOTES THE GOALS OF THE ACT. ....	10
V.	STRENGTHENING, NOT REDUCING, UNBUNDLING OBLIGATIONS IS THE BEST WAY TO PROMOTE BROADBAND DEPLOYMENT. ....	11
VI.	INTERMODAL COMPETITION IS IRRELEVANT TO THE COMMISSION’S UNBUNDLING ANALYSIS. ....	13
VII.	THE COMMISSION SHOULD ADOPT THE PACE PROPOSAL. ....	14
VIII.	THE FCC SHOULD REJECT ILEC PROPOSALS TO SUNSET UNBUNDLING OBLIGATIONS. ....	15
IX.	CONCLUSION .....	16

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

REPLY COMMENTS OF  
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises (“ASCENT”)<sup>1</sup> hereby submits these reply comments in the above-captioned proceeding concerning the Commission’s Triennial Review of unbundled network elements (“UNEs”).<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

Since initial comments were filed in April, two significant court decisions have been released concerning issues in this docket. The Supreme Court’s *Verizon* decision affirms the ILECs’ obligation to provide competitors with UNE combinations, such as UNE-P, removing all doubt about competitors’ ability to employ this valuable tool. The D.C. Circuit’s *USTA* decision,

---

<sup>1</sup> ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 01-338, FCC 01-361, released December 20, 2001 (“*NPRM*”).

however, is erroneous in many respects. Because it is likely to be reversed on appeal, it may be prudent to defer decisions in this proceeding until that decision becomes final.

ASCENT urges the Commission to retain its existing unbundling analysis and existing UNEs in order to foster competition. The Commission's impairment test demonstrates that CLECs should continue to have access to UNEs that comprise UNE-P. In addition, based on the record in this proceeding, ASCENT believes that strengthening unbundling obligations, rather than reducing them, will best promote broadband deployment under section 706. ASCENT encourages the Commission to retain the current five-factor impairment test. Intermodal competition is not relevant to this analysis. ASCENT notes widespread support of the elements of the PACE proposal and encourages the Commission to implement this plan in order to integrate the valuable and unique expertise of the states into the unbundling analysis. Finally, ASCENT believes it is premature to consider sunseting unbundling obligations and the Commission should reject any such proposals.

## **II. THE SUPREME COURT MANDATES UNE-P IN *VERIZON COMMUNICATIONS, INC. V. FCC*.**

Since initial comments were filed in this proceeding, the Supreme Court issued its decision in *Verizon Communications, Inc. v. FCC*.<sup>3</sup> The Supreme Court's *Verizon* decision affirms ILECs' obligation to provide competitors with UNE combinations,<sup>4</sup> such as UNE-P. To reach this conclusion, the Court relied on the inherent disparity between incumbent and competitive providers: "If Congress had treated incumbents and entrants as equals, it probably would be plain enough that incumbents' obligations stopped at furnishing an element that could

---

<sup>3</sup> 535 U.S. \_\_\_\_, 122 S.Ct. 1646 (2002).

<sup>4</sup> See *Verizon*, 122 S.Ct. at 1649, 1652.

be combined. The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal....”<sup>5</sup> Thus, the decision removes all doubt about competitors’ ability to avail themselves of UNE combinations, which are valuable tools in carriers’ business plans and market entry strategies.

In *Verizon*, the Court also affirmed TELRIC pricing, confirming that it does not discourage facilities-based investment. Noting the undisputed contention that CLECs have invested more than \$55 billion in facilities since 1996, the Court observed that a “regulatory scheme that can boast such substantial competitive spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.”<sup>6</sup> ASCENT is pleased to have regulatory certainty on these issues resulting from this decision and encourages the Commission in this proceeding to state that it will strongly enforce ILEC obligations to provide UNE combinations.

### **III. THE D.C. CIRCUIT’S DECISION IN *UNITED STATES TELECOM ASS’N V. FCC* IS ERRONEOUS IN MANY RESPECTS.**

Shortly after release of the *Verizon* decision, the D.C. Circuit issued its decision in *United States Telecom Ass’n v. FCC*.<sup>7</sup> In *USTA*, the D.C. Circuit remanded the *UNE Remand Order*<sup>8</sup> and the *Line Sharing Order*<sup>9</sup> back to the FCC for further consideration,<sup>10</sup> finding that the

---

<sup>5</sup> *Verizon*, 122 S.Ct. at 1684.

<sup>6</sup> *See Verizon*, 122 S.Ct. at 1676.

<sup>7</sup> 290 F.3d 415 (D.C. Cir. 2002).

<sup>8</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”).

<sup>9</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”).

<sup>10</sup> *USTA*, 290 F.3d at 430.

Commission had failed to adequately explain its reasons for establishing the national list of UNEs, including line sharing.<sup>11</sup> The *USTA* decision, however, is inconsistent with the Supreme Court's *Verizon* decision, well-settled principles of administrative law, as well as other provisions of the Act.

**A. USTA Is Inconsistent with the Supreme Court's Verizon Decision on TELRIC.**

In *USTA*, the court assumed that TELRIC-based pricing for network elements was "price below true cost," worsening the perceived investment disincentives of unbundling. In *Verizon*, however, the Supreme Court deferred to the FCC's expert judgment in upholding TELRIC as a reasonable measure of ILECs' economic cost and finding no corresponding economic disincentive regarding ILEC or CLEC investment in facilities. Although consideration of TELRIC arose in slightly varied contexts, the TELRIC analysis of both courts should have been consistent. As the FCC stated in its petition for rehearing of *USTA*, the D.C. Circuit's "insistence on its economic assumptions with respect to network unbundling is, at a minimum, in tension with the Supreme Court's deference to the FCC's analysis of network element pricing in *Verizon*."<sup>12</sup>

**B. USTA Is Contrary to the Principles of Chevron.**

The *USTA* court's failure to defer to the FCC's judgment with respect to TELRIC, especially in light of the *Verizon* Court's recent exercise of such deference, is contrary to the principles of *Chevron*. In *Verizon*, the Court stated:

Whether the FCC picked the best way to set [UNE] rates is the stuff of debate for economists and regulators versed in the technology of telecommunications and

---

<sup>11</sup> See *USTA*, 290 F.3d at 425, 429.

<sup>12</sup> *FCC Rehearing Petition* at 9-10. On July 8, 2002, the FCC filed with the D.C. Circuit a *Petition for Rehearing or Rehearing En Banc* of the *USTA* case (Docket Nos. 00-1012, *et al.*, and 00-1015, *et al.*) ("*FCC Rehearing Petition*").

microeconomics pricing theory. The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them.<sup>13</sup>

As the Commission states in its *FCC Rehearing Petition*, notwithstanding the *USTA* panel's acknowledgement of the extraordinary complexity of the Commission's task to implement unbundling provisions, "the panel stepped directly into the 'debate for economists and regulators' and engaged in precisely the kind of 'freewheeling policy inquiry' that *Chevron* forbids."<sup>14</sup>

C. UNE-Based Competition Is Not Synthetic.

In addition to the above deficiencies, ASCENT notes its strong objection to the *USTA* court's description of UNE-based competition as "synthetic."<sup>15</sup> This statement is in direct conflict with Congress' establishment in the Act of three distinct and equally valid modes of competition: facilities-based, resale, and UNE-based.<sup>16</sup> In fact, the unbundling requirements of Sections 251 and 271 provide the very foundation of the Act's pro-competitive structure. Clearly, the D.C. Circuit's label is a misnomer, and any attempt to reduce UNE-based competition as a result of this mischaracterization would be unlawful.

---

<sup>13</sup> 122 S.Ct. at 1687.

<sup>14</sup> *FCC Rehearing Petition* at 10-11.

<sup>15</sup> *USTA*, 290 F.3d at 424.

<sup>16</sup> See, e.g., *UNE Remand Order*, 15 FCC Rcd at 3700 ("[w]e recognize there will be a continuing need for all three of the arrangements Congress set forth in section 251 [facilities-based, UNE-based, and resale] to remain available to competitors so they can serve different types of customers in different geographic areas").

**D. In Light of These Errors, The Commission Should Defer Its Decision in this Docket.**

In light of the errors in the *USTA* decision and the FCC's pending petition for rehearing,<sup>17</sup> the Commission should consider deferring decision in this docket until the *USTA* decision becomes final.

**IV. THE FCC SHOULD RETAIN ITS EXISTING UNBUNDLING ANALYSIS AND UNES TO PRESERVE AVAILABILITY OF UNE-P.**

**A. CLECs Would Be Impaired Without Access to the Existing UNEs Comprising UNE-P.**

Pursuant to the Commission's rules established in the *UNE Remand Order*, an ILEC's failure to provide access to a non-proprietary network element "impairs" the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside of the incumbent's network, including self-provisioning, by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.<sup>18</sup> The FCC's impairment analysis evaluates the cost, timeliness, quality, ubiquity and operational issues associated with use of an alternative.<sup>19</sup> Based on this standard, CLECs would be impaired without access to the existing UNEs comprising UNE-P.

---

<sup>17</sup> The *FCC Rehearing Petition* also states that the *USTA* court erroneously interpreted the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 252 U.S. 366 (1999), potentially creating an unwarranted restriction on competitor access to unbundled network elements that is inconsistent with other provisions of the 1996 Act. *FCC Rehearing Petition* at 2-3.

<sup>18</sup> 47 C.F.R. § 51.317(b)(1).

<sup>19</sup> 47 C.F.R. § 51.317(b)(2).



1. The Commission Must Require Continued Unbundled Access to Local Loops.

As the Commission previously determined, “without access to unbundled loops, competitors would need to invest immediately in duplicative facilities in order to compete for most customers, and [ ] such investment and construction would likely delay, if not prohibit, market entry and postpone, perhaps indefinitely, the benefits of telephone competition for consumers.”<sup>20</sup> The same cost and timing issues hold true today, and no credible arguments have been made that alternative loop facilities currently exist which are comparable in ubiquity and functionality as ILEC loops. Thus, it is clear that the Commission must continue to require unbundling of the local loop.

2. The Commission Must Require Continued Unbundled Access to Local Switching Services.

CLECs are materially impaired without access to unbundled local switching necessary to provide UNE-P service to mass market customers. Ubiquity is an essential element of any mass market service offering. To replicate the reach of the ILEC network, CLECs would need to overbuild the entire ILEC switching network, a task that would necessarily be unduly time-consuming, since switch deployment requires six to twelve months of lead time,<sup>21</sup> and extremely expensive. The cost issue is further exacerbated by excessive collocation charges, backhauling costs, and exorbitant “hot-cut” rates.<sup>22</sup> Moreover, because ILECs have larger customer bases,

---

<sup>20</sup> *UNE Remand Order*, 15 FCC Rcd at 3779.

<sup>21</sup> *See, e.g., UNE Remand Order*, 15 FCC Rcd at 3818.

<sup>22</sup> *See, e.g., Comments of the Association of Communications Enterprises* filed on April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 36. (“ASCENT Comments”) The hot-cut process is also prone to customer disruption. *See, e.g., Comments of the UNE Platform Coalition* filed on April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 46 (“UNE-P Coalition Comments”).

they are able to leverage economies of scale and deploy such facilities in a far more efficient manner than a start-up CLEC ever could. Clearly, these circumstances combine to demonstrate how CLECs would be materially impaired if unbundled local switching were no longer made available to them. To avoid this inequity and enable CLECs to compete with ILECs as envisioned by the 1996 Act, the Commission should continue to provide unbundled access to local switching.

In addition, several commenters agree that geographic restrictions on unbundled local switching should be eliminated.<sup>23</sup> UNE-P has proven to be the only competitive alternative for the typical mass-market customer. As advocated by ASCENT in its initial comments,<sup>24</sup> the Commission should examine these restrictions and, if it does not conclude to eliminate such restrictions entirely, follow the lead of several state public utility commissions and loosen such restrictions in order to promote competition in all market segments.<sup>25</sup>

3. Unbundled Shared Interoffice Transport Should Continue to Be Made Available.

In the *UNE Remand Order*, the Commission required unbundling of ILEC shared transport, explaining “[w]ithout access to unbundled shared transport, a requesting carrier would have to self-provision or purchase dedicated transport from the ILEC, which would materially increase the costs and decrease the quality of services the requesting carrier could provide, and

---

<sup>23</sup> See, e.g., Comments of AT&T Corp. filed April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 206 (“AT&T Comments”); UNE-P Coalition Comments at 50-51.

<sup>24</sup> ASCENT Comments at 33-34.

<sup>25</sup> See, e.g., Comments of New York State Department of Public Service filed April 4, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 8 & n.32 (“New York Comments”); UNE-P Coalition Comments at 34 & n.68.

would materially limit the carrier's ability to serve a broad base of customers."<sup>26</sup> The substantial delays and expenses associated with self-provisioning or obtaining transport from an alternative source, assuming such an alternative were even available, would still materially impair CLECs. In addition, it is doubtful that either alternative would have ubiquity and quality comparable to that of the ILEC network. As the UNE-P Coalition observes, "[w]ithout this essential building block, UNE-P entry would cease to be a viable method of serving the residential and small business markets, and the overall pace and scope of competition would be severely limited."<sup>27</sup> Thus, the Commission should continue to provide unbundled shared interoffice transport.

4. Operator Service and Directory Assistance (OS/DA) Must Remain Unbundled.

Pursuant to the *UNE Remand Order*, prior to removing OS/DA from the national list of network elements, ILECs must implement "customized routing to the requesting carrier as part of the unbundled switching element" to enable CLECs to direct such traffic to alternative service providers.<sup>28</sup> Although alternative OS/DA service providers may be available, the *UNE Remand Order* failed to consider whether the customized routing to such providers could be provided in an efficient manner. Because UNE-P allows CLECs to serve a large number of geographically dispersed customers within an ILEC's territory, CLECs cannot efficiently or cost-effectively avail themselves of ILEC's "custom routing" "solutions." Without unbundled OS/DA, CLECs would have to haul this geographically dispersed traffic from each ILEC end office to an alternative OS/DA provider over costly DS-1 transport facilities. At this stage, CLECs simply

---

<sup>26</sup> *UNE Remand Order*, 15 FCC Rcd at 3864.

<sup>27</sup> UNE-P Coalition Comments at 55.

<sup>28</sup> *UNE Remand Order*, 15 FCC Rcd at 3893.

have not yet achieved the high market penetration levels needed to justify this substantial cost. In accordance with the views of other UNE-P providers and state commissions, the Commission should find that OS/DA must remain unbundled because ILEC customized routing has not diminished the material impairment CLECs face.<sup>29</sup>

**B. UNE-P Promotes the Goals of the Act.**

As the UNE-P Coalition aptly stated, “[t]he fact remains that six years after the passage of the Act, Congress’ goal of robust local competition is still far from being achieved – and the continued availability of UNEs and UNE combinations are essential to meeting that goal at any time in the foreseeable future.”<sup>30</sup> The states where local competition is strongest are those states where UNE-P is widely available.<sup>31</sup> Moreover, AT&T presents evidence that “the rate of ILEC investment in facilities is higher in the states with the highest levels of UNE-P entry ... than it is in comparable states where UNE-P based competition has yet to emerge.”<sup>32</sup> Clearly, UNE-P providers have fulfilled the intent of the Act by rapidly entering the market and serving a large number of customers, including residential customers not typically targeted by competitive

---

<sup>29</sup> See, e.g., UNE-P Coalition Comments at 57 (noting concurrence by the Michigan Public Service Commission: “The record supports the ALJ’s finding regarding the infeasibility and limited usefulness of the customized routing that Ameritech Michigan proposed to accommodate the CLEC’s OS/DA requirements. The record indicates that providing this type of customized routing as the only alternative to purchasing Ameritech Michigan’s wholesale OS/DA services at market prices (set by Ameritech Michigan) would require each CLEC to establish dedicated trunks to every end office it serves. The Commission finds that this alternative would be costly, inefficient and unduly burdensome.”). *Id.* at 57-58 (citations omitted).

<sup>30</sup> UNE-P Coalition Comments at 39.

<sup>31</sup> See, e.g., UNE-P Coalition Comments at 4.

<sup>32</sup> AT&T Comments at 18.

carriers who otherwise may not realize the benefits of a competitive marketplace, while also promoting facilities investment.<sup>33</sup>

The UNE-based service model is the most feasible market entry strategy in this difficult economic climate and must be preserved by the Commission in this proceeding. UNE-P is successful because it addresses each of the most critical impairments that discourage CLECs from offering “mass market” services. Fundamental operational problems and extreme costs associated with implementing new switches are minimized with UNE-P. Carriers can efficiently establish a ubiquitous presence within a service area, facilitating greater market penetration. With this increased market penetration, CLECs are more quickly able to achieve the economies of scale necessary to justify facilities-based investment and attract the capital needed to fund such investment than they would without this market entry strategy.<sup>34</sup> In light of the competition UNE-P has prompted in the local market and the viability of this market entry strategy in this difficult economic climate, the Commission must continue to make these UNEs and UNE combinations such as UNE-P available.

**V. STRENGTHENING, NOT REDUCING, UNBUNDLING OBLIGATIONS IS THE BEST WAY TO PROMOTE BROADBAND DEPLOYMENT.**

As the comments filed in this proceeding indicate, there is no reasonable basis on which the Commission may conclude to ignore or reduce the unbundling obligations of Section 251 in order to speed deployment of advanced services. To the contrary, the only reasonable interpretation of the Act is that Congress intended the goals of section 706 to be consist with, and

---

<sup>33</sup> See Comments of Business Telecom, Inc. filed April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 10 (noting that of all the lines served by UNE-P in Georgia, 60% were residential lines) (“BTI Comments”).

<sup>34</sup> See BTI Comments at 11.

fulfilled by, implementation of unbundling obligations and the development of competition.<sup>35</sup> ASCENT agrees with AT&T that “[u]nbundling requirements *promote*, rather than retard, investment in advanced services facilities and therefore foster the deployment of those facilities and the provision of advanced services to consumers. Maintaining and strengthening unbundling requirements is therefore one of the best means to carry out the objectives of section 706. Conversely, weakening unbundling requirements would subvert those objectives.”<sup>36</sup>

Further, WorldCom presents statistical data demonstrating that the unbundling obligations clearly have not caused ILECs to decrease their investment on plant additions. To the contrary, after 1996, WorldCom’s data actually illustrates a dramatic increase in ILEC investments.<sup>37</sup> Since 1997, CLECs have invested \$56 billion in building their own networks<sup>38</sup> and ILECs have invested over \$100 billion.<sup>39</sup> In light of this data, ILECs cannot credibly assert that the unbundling obligations are causing disincentives to invest in their networks. As the Supreme Court noted, “it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.”<sup>40</sup> The Commission, therefore, should conclude

---

<sup>35</sup> See, e.g., Comments filed by Association for Local Telecommunications Services, Cbeyond Communications, LLC, DSLnet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., PaeTec Communications, Inc., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp. on April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 33-34. (“Joint Comments”).

<sup>36</sup> AT&T Comments at 85.

<sup>37</sup> Comments of WorldCom, Inc. filed April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 97-98 (“WorldCom Comments”).

<sup>38</sup> Association for Local Telecommunications Services, *The State of Local Competition 2001* at 20 (February 2001) (“*ALTS Report*”).

<sup>39</sup> *Verizon*, 122 S.Ct. at 1676 n.33.

<sup>40</sup> *Verizon*, 122 S.Ct. at 1676.

that it should promote the goals of section 706 through maintaining and strengthening unbundling obligations under Section 251.

**VI. INTERMODAL COMPETITION IS IRRELEVANT TO THE COMMISSION'S UNBUNDLING ANALYSIS.**

ASCENT agrees with those commenters that view intermodal competition as irrelevant to the Commission's impairment analysis.<sup>41</sup> The intermodal competitors at issue are cable and wireless service providers. Section 251(d)(2)(B) of the Act requires the Commission to consider whether the "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the service that *it seeks to offer*."<sup>42</sup> CLECs desire to offer wireline service, not wireless service or cable telephony, are entitled under Section 251 to the unbundled network elements that will allow them to do so. Moreover, intermodal competition has no bearing on Section 251's impairment analysis because none of the providers of intermodal competition offer access over their facilities on a wholesale basis. As Covad notes, it cannot use cable, wireless or satellite facilities to replace DS-1 loops because the facilities are not available to be leased by requesting carriers.<sup>43</sup> As ASCENT observed in its initial comments, availability of alternative network components would only be relevant to the extent a competitor would otherwise secure such components from an ILEC.<sup>44</sup>

---

<sup>41</sup> See Joint Comments at 36.

<sup>42</sup> 47 U.S.C. § 251(d)(2)(B).

<sup>43</sup> See Comments of Covad Communications Company filed April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 43 ("Covad Comments").

<sup>44</sup> ASCENT Comments at 26.

## VII. THE COMMISSION SHOULD ADOPT THE PACE PROPOSAL.

In its initial comments, ASCENT expressed its strong support for the proposal advanced by Promoting Active Competition Everywhere (“PACE”). The PACE proposal advocates the Commission’s adoption of a baseline national list of UNEs that define minimum ILEC unbundling obligations, and to the extent unbundling obligations are reduced, states would evaluate whether such reductions would take effect in their state. Under PACE, states would also remain free to require additional unbundling, beyond the national baseline.

Aside from the ILECs, most carriers generally support the elements of the PACE plan in order to harness the valuable expertise of the states.<sup>45</sup> The ILECs claim that states lack authority to require greater unbundling beyond that ordered by the Commission.<sup>46</sup> As the UNE-P Coalition observes, however, “[t]he role outlined for the States in the PACE Coalition Petition is consistent with the 1996 Act and the Commission’s decisions interpreting the statute. Indeed, Section 251(d)(3) of the Act provides State regulators with the authority to establish additional unbundling obligations, so long as those obligations comply with subsections 251(d)(3)(B) and (C).”<sup>47</sup> Moreover, this decision-making process would be consistent with ongoing proceedings in several states.<sup>48</sup> Accordingly, ASCENT asks the Commission to discount the ILEC objections and to implement the PACE proposal.

---

<sup>45</sup> See, e.g., UNE-P Coalition Comments at 32; Covad Comments at 88 (supporting states’ ability to adopt additional UNEs but not to delist those established by the FCC).

<sup>46</sup> See, e.g., Comments and Contingent Petition for Forbearance of the Verizon Telephone Companies filed April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 64 (“Verizon Comments”).

<sup>47</sup> UNE-P Coalition Comments at 32.

<sup>48</sup> See, e.g., UNE-P Coalition Comments at 33 & n.65 (citing example of how Texas Public Utilities Commission concluded that local switching and OS/DA should continue to be offered on an unrestricted basis).



### **VIII. THE FCC SHOULD REJECT ILEC PROPOSALS TO SUNSET UNBUNDLING OBLIGATIONS.**

In its initial filing, ASCENT strongly opposed adoption of any sunset period for lifting unbundling obligations.<sup>49</sup> Verizon, however, proposes implementing a three-year sunset from the effective date of a Commission order in this proceeding “to ensure that CLECs face the proper investment incentives going forward.”<sup>50</sup> Most commenters agree that the Commission should not establish any sunset period for lifting unbundling obligations.<sup>51</sup> As the CPUC observes, “an automatic sunset procedure would be arbitrary, [ ] would fail to take into account the actual state of development of alternative UNE providers,” and would “significantly raise the entry barriers faced by CLECs.”<sup>52</sup> Not only is a sunset premature given the nascent state of competition, but as the Commission has previously recognized, it would be impossible to predetermine the date on which the unavailability of any network element would no longer impair competitors’ ability to provide service. In the interest of providing CLECs with the regulatory certainty they need that the UNEs they are using now will continue to be available in the future, ASCENT urges the Commission to decline to impose a sunset on UNE availability.<sup>53</sup>

---

<sup>49</sup> ASCENT Comments at 50.

<sup>50</sup> See, e.g., Verizon Comments at 70.

<sup>51</sup> See, e.g., Covad Comments at 87; Comments of the People of the State of California and the California Public Utilities Commission filed April 5, 2002 in CC Docket Nos. 01-338, 96-98, 98-147 at 15 (“California Comments”).

<sup>52</sup> California Comments at 15.

<sup>53</sup> See California Comments at 15-16.

**IX. CONCLUSION**

In light of the foregoing, ASCENT respectfully requests the Commission to issue a decision in this proceeding in accordance with the recommendations herein.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_

Walter G. Blackwell, President  
David Gusky, Executive Vice President  
The Association of Communications  
Enterprises  
1401 K Street, N.W., Suite 600  
Washington, D.C. 20005  
Telephone: (202) 835-9898  
Facsimile: (202) 835-9893

Dated: July 17, 2002